

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Insight Technology, Inc.

v.

Civil No. 04-cv-74-JD
Opinion No. 2007 DNH 135

SureFire, LLC

O R D E R

Insight Technology, Inc. brings a patent infringement action against SureFire, LLC, alleging infringement of United States Patent Number 6,574,901 ("901 patent"). The '901 patent is titled "Auxiliary Device for a Weapon and Attachment Thereof." Following claim construction, both Insight and SureFire have moved for summary judgment. Each then moved to strike certain exhibits submitted by the other in support of and in opposition to summary judgment.

I. Insight's First Motion to Strike (document no. 101)

Insight moves to strike the affidavit and its attachments submitted by SureFire's expert witness, John A. Wilson, and certain exhibits submitted with the affidavit of SureFire's counsel, Laura L. Carroll, filed in support of its motion for summary judgment. In response, SureFire argues that no disclosure was required because the Wilson affidavit and the

attached animations are merely demonstrative evidence. SureFire contends that Insight has waived its objections to the challenged exhibits to Carroll's affidavit, that the exhibits are admissible because they have been authenticated, that one challenged declaration was previously disclosed, and that the dates on certain documents are admissible. Insight has filed a reply, which opposes SureFire's arguments.

A. Affidavit of John A. Wilson

SureFire submitted the affidavit of its expert witness, John A. Wilson, which included a compact disc of animations, in support of its motion for summary judgment. Insight contends that the affidavit and its animations must be stricken because the affidavit is based on undisclosed expert opinions or, alternatively, because Wilson was not disclosed as a fact witness as required by Federal Rule of Civil Procedure 26(a)(1)(A). SureFire argues that Wilson's affidavit is merely authentication of the attached animations and that the affidavit is admissible under Federal Rule of Evidence 901(b)(1). SureFire also asks that the animations be allowed even if the affidavit is stricken.

Wilson's affidavit describes seventeen animations of certain devices, submitted on a compact disc, which are: "(1) the scope ring attachment mechanism disclosed in Great Britain Patent No.

13,444 . . .; (2) the compensator attachment mechanism disclosed in U.S. Pat. No. 4,944,213 . . .; (3) the attachment mechanism used on the SOCOM LAM battery case; (4) the attachment mechanism used on by [sic] the Wilcox NightStalker System; (5) the attachment mechanism used by Insight on its M3 lights, . . . ; and (6) the Glock Slide Lock and GTL attachment mechanism." Aff.

¶ 4. In support of his statements about the animations, Wilson explains that he was "retained by counsel for SureFire, LLC ("SureFire"), defendant in this action, to analyze and offer expert opinions regarding a patent assigned to the plaintiff, Insight" and refers to his expert report. Wilson also provides his professional qualifications and states that he is "familiar with the various mechanical devices referenced in SureFire's Motion for Summary Judgment, and understand[s] the mechanical operation of each device depicted in the animations." Id. He then identifies the devices and mechanisms used in the animations and explains the operations shown.

SureFire argues that Wilson's affidavit is not expert testimony but instead is merely used to authenticate the animations as required by Federal Rule of Evidence 901. Rule 901 states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims" and provides examples of such evidence. Rule 901 does not, as SureFire contends, make authentication evidence admissible.

The information provided in the affidavit, as Wilson states, is based on his professional expertise and his familiarity with the devices shown in the animations. A witness is an expert, governed by Federal Rule of Evidence 702 and subject to disclosure requirements, if his "testimony is based on 'technical' and 'other specialized knowledge.'" Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999) (quoting Rule 702); see also Freedom Wireless, Inc. v. Boston Commc'ns, 369 F. Supp. 2d 155, 158 (D. Mass. 2005). In contrast, a witness who is not testifying as an expert is limited to providing opinions and inferences that do not require technical or specialized knowledge. Fed. R. Evid. 701.

Wilson's affidavit provides his expert opinion about what is being shown in the animations. SureFire does not contend that those opinions were disclosed as required by Rule 26(a)(2). Insight asserts that the opinions must be stricken.

"The expert disclosure requirements are not merely aspirational, and courts must deal decisively with a party's failure to adhere to them." Lohnes v. Level 3 Commc'ns., Inc., 272 F.3d 49, 60 (1st Cir. 2001); see also 02 Micro Int'l Ltd. v.

Monolithic Power Sys., Inc., 467 F.3d 1355, 1368 (Fed. Cir. 2006).¹ A party who fails to disclose information required from an expert witness, without substantial justification, will not be permitted to use that evidence for purposes of summary judgment unless the failure to disclose was harmless. Fed. R. Civ. P. 37(c); Poulis-Minott v. Smith, 388 F.3d 354, 358 (1st Cir. 2004). It is the proponent's burden to show that failure to comply with expert disclosure was substantially justified or harmless. Primus v. United States, 389 F.3d 231, 234 (1st Cir. 2004); Cell Genesys, Inc. v. Applied Research Sys. ARS, 499 F. Supp. 2d 59, 80 (D. Mass. 2007).

SureFire states that its failure to disclose Wilson's new opinions are harmless because "[t]hese animations depict devices which are well know to Insight and have been the subject of this litigation since the outset." Obj. to Motion to Strike at 4. SureFire explains that Wilson's new opinions "simply illustrate the operation of these devices more clearly than [sic] even the devices themselves." Id. Insight objects to Wilson's opinions

¹Because "[e]videntiary rulings do not generally raise issues unique to patent law, . . . [the Federal Circuit] applies the law of the appropriate regional circuit to such procedural rulings." Honeywell Int'l Inc. v. Univ. Avionics Sys. Corp., 488 F.3d 982, 994 (Fed. Cir. 2007).

and asserts prejudice based on lack of notice that prevented Insight from deposing Wilson on these subjects.

SureFire has not shown that Insight would not be prejudiced by allowing Wilson's new opinions. In fact, SureFire's statement, that Wilson's opinions illustrate the operation of the devices in the animations "more clearly," highlights the prejudice that his testimony would cause. SureFire does not suggest that its failure to disclose was justified, and because SureFire was aware of the devices depicted in the animations since the beginning of the litigation, no justification for the delay is apparent. Therefore, Wilson's affidavit is stricken and will not be considered for purposes of summary judgment.

To be admissible, the animations must be authenticated by independent evidence or be self-authenticating. Fed. R. Evid. 901; Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 559 (D. Md. 2007) ("Courts generally have allowed the admission of computer animations if authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help to illustrate the testimony given in the case."). In the absence of Wilson's explanations, the animations are unauthenticated drawings of unidentified devices. Therefore, the animations are not competent to support SureFire's motion for

summary judgment. See Gorski v. N.H. Dep't of Corrs., 290 F.3d 466, 475-76 (1st Cir. 2002) (holding that for summary judgment party "must proffer admissible evidence that could be accepted by a rational trier of fact as sufficient to establish the necessary proposition").

B. Attachments to Carroll Affidavit

Insight moves to strike certain exhibits attached to Laura Carroll's affidavit as hearsay, lacking authentication, and because the witness was not disclosed. SureFire responds, arguing that Insight has waived its objections by failing to raise them previously, that the challenged documents were previously authenticated, and that some documents fall into an exception to the hearsay rule.

1. Waiver

SureFire asserts that the challenged documents have been used in support of other motions in this case and in the related case, Insight Tech., Inc. v. Glock Ges.m.b.H., 03-cv-253-JD (stipulation of dismissal entered June 18, 2007), without objection from Insight. SureFire contends that Insight has waived its current objections to the documents by failing to raise them previously. In support of its waiver theory, SureFire

cites The Lexington Children's Ctr. v. Dist. Council 1707, 2004 WL 540475 at *3, n.3 (S.D.N.Y. March 17, 2004), in which the court held that work product immunity was waived by plaintiff's counsel when the letter in question was given to the defendant and that failure to object on hearsay grounds at a hearing waived the objection for purposes of the preliminary injunction proceeding. SureFire also cites cases providing the well-settled rule that a party's failure to object to evidence at trial forecloses the party's opportunity to challenge the evidence on appeal. See United States v. Newton, 891 F.2d 944, 948 (1st Cir. 1989).

Neither case stands for the proposition SureFire asserts here. The work product privilege discussed in Lexington Children's was waived by disclosing the confidential document to the defendant, not by failing to raise an objection. See United States v. M. I. T., 129 F.3d 681, 687 (1st Cir. 1997) (explaining work product privilege). The hearsay objection in Lexington Children's was waived for purposes of the preliminary injunction proceeding because it was not raised at the hearing. Similarly, objections to evidence submitted for purposes of supporting or opposing summary judgment are waived if not raised in that context. See Perez v. Volvo Car Corp., 247 F.3d 303, 314-15 (1st

Cir. 2001). Because this case is not on appeal, the First Circuit's raise or waive rule does not apply here.

In the absence of controlling or at least persuasive authority to support SureFire's waiver theory, the court will not deem waived any objections that were not previously made in the in this case or the Glock case.

2. Hearsay Documents

Insight challenges Exhibits I, J, K, L, M, N, O, EE, and MM submitted with Laura Carroll's affidavit as inadmissible hearsay. The challenged documents are letters and facsimile communications between Glock Austria and Glock U.S. and with SureFire. SureFire does not dispute that the documents are hearsay but instead asserts that the documents have been authenticated in the context of other motions and are otherwise admissible.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay that is not within an exception to that rule is not admissible. United States v. Rivera-Hernandez, 497 F.3d 71, 80 (1st Cir. 2007). In contrast, authenticity under Federal Rule of Evidence 901 is a separate requirement that a proponent of evidence show that the document is what it purports to be. See, e.g., United States v. Vigneau, 187 F.3d 70, 78 n.7 (1st Cir.

1999); United States v. McMahon, 938 F.2d 1501, 1508 (1st Cir. 1991). Even if the authenticity of documents is established, the content, nevertheless, may be inadmissible hearsay. United States v. Tajeddini, 945 F.2d 458, 464-65 (1st Cir. 1991) (abrogated on other grounds by Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

SureFire contends that Exhibit EE is a marketing study produced for Insight and states that "clearly Insight's reliance and use of that information is admissible, as is the date of that study." Obj. at 7. Although far from clear, it appears that SureFire concedes that the document is hearsay and proposes to use only the date of the document and evidence that Insight relied on it. Because the document is hearsay, it is inadmissible. Whether other evidence related to the document is admissible is not sufficiently presented to allow a ruling.

With respect to Exhibit MM, SureFire asserts that it is a business record within the business records exception to the hearsay rule. Under Federal Rule of Evidence 803(6), "business records are not excluded by the rule against hearsay 'if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . record . . . unless the source of the information or the method or circumstances of preparation indicate lack of

trustworthiness.'" United States v. Munoz-Granco, 487 F.3d 25, 38 (1st Cir. 2007) (quoting Rules 803(6)). "A party who seeks admission of hearsay evidence bears the burden of proving each element of the exception that he asserts." United States v. Bartelho, 129 F.3d 663, 670 (1st Cir. 1997).

Exhibit MM is a letter bearing a letterhead of Wilcox Industries Corp. from James W. Teetzel, President of Wilcox, to Peter Brock at Glock Gesellschaft m.b.h. with several drawings and a price sheet. SureFire asserts that the requirements of Rule 803(6) are met because the letter with its attachments was produced by Wilcox in response to a subpoena issued by Insight in the Glock case. That does not satisfy the requirements of Rule 803(6), however, and SureFire offers nothing else to satisfy its burden of showing that Exhibit MM falls within the Rule 803(6) exception. Therefore, the letter, with its attachments, is excluded.

3. Exhibit KK

Insight moves to strike Exhibit KK, which Carroll's affidavit identifies as marketing material, for lack of authentication. Insight contends that Carroll lacks personal knowledge of Exhibit KK and, therefore, cannot provide authentication required under Federal Rule of Evidence 901.

SureFire responds that Exhibit KK was produced to Insight in response to a subpoena in the Glock case.

Rule 901(a) requires the proponent of evidence to identify it by providing independent evidence that is "sufficient to support a finding that the matter in question is what its proponent claims." Although not clearly raised, SureFire may be implying that Exhibit KK does not need authentication because Insight knows what it is. The purpose of the rule, however, is to support a finding that the evidence is what its proponent claims not merely to identify the evidence for the opposing party. Therefore, SureFire has not satisfied Rule 901(a) by providing the affidavit of its counsel or Insight's subpoena in the Glock case for the documents in Exhibit KK. Exhibit KK is not admissible and is stricken.

4. Robert Glock's Declaration

Insight moves to strike a declaration made by Robert Glock, Exhibit F, in support of SureFire's motion for summary judgment on the grounds that Glock was not identified as a witness as required by Federal Rule of Civil Procedure 26(a)(1) and because two sentences in paragraph five of the declaration are hearsay and are not based on Glock's personal knowledge. SureFire responds that it identified Glock as a witness by submitting his

affidavit in support of a prior motion for summary judgment filed in March of 2005 and that SureFire could have but did not depose Glock in the related Glock case.²

For purposes of summary judgment, affidavits and declarations must be based on personal knowledge. Perez, 247 F.3d at 315. Personal knowledge, in this context, means knowledge of facts, not "conclusions, assumptions, or surmise." Id. at 316. Affidavit statements that report conversations with others must be sufficiently specific as to who, when, and what to support a conclusion that the declarant has personal knowledge of what he describes. Id.

SureFire does not respond to Insight's opposition to Glock's statements in paragraph five of his declaration. Glock's challenged statement is: "Based on my conversations with my father, other engineers at Glock Austria, and members of the Austrian military, I can attest that using a spring biased mechanism for this purpose was common knowledge at Glock Austria well before 1997." Carroll Aff., Ex. F. While the statement is specific as to the conclusion Glock reached, it does not repeat the factual basis for that conclusion or provide dates for the conversations. As such, the statement is a conclusion based on

²SureFire's prior motion for summary judgment was denied without prejudice on June 14, 2005.

the knowledge of others, which is not admissible for purposes of summary judgment.

Insight also seeks to strike the entire affidavit based on SureFire's failure to identify Glock as a witness under Rule 26(a)(1) and contends that submission of Glock's declaration in March of 2005 in support of the prior motion for summary judgment was insufficient. Insight points out that fact discovery closed in this case in December of 2004, which would have prevented a deposition of Glock in March of 2005. Insight contends that it could not have deposed Glock in the related Glock case for purposes of this case.

The order allowing the parties in this case to use evidence adduced in the related Glock case was entered December 8, 2006, after the parties in that case entered a settlement agreement in October of 2006. SureFire does not explain how that order would have permitted Insight to depose Glock in the Glock case for purposes of responding to his declaration submitted in this case in March of 2005. Therefore, as submitted in support of summary judgment, Glock's declaration is stricken.

5. Dates on Documents

Insight challenges the dates on all exhibits as hearsay in the absence of evidence to establish the date on which the

document was created or transmitted. SureFire responds with evidence about the dates of some of the documents based on materials previously submitted in this case.

Dates on letters or other documents, when offered to prove the truth of the date, are inadmissible hearsay unless an exception applies or the date can be proven by other means. See, e.g., Lozano v. Ashcroft, 258 F.3d 1160, 1166 n.6 (10th Cir. 2001); United States v. McCulley, 178 F.3d 872, 876 (7th Cir. 1999); Hill v. Citibank Corp., 312 F. Supp. 2d 464, 474 (S.D.N.Y. 2004); Hilgraeve, Inc. v. Symantec Corp., 271 F. Supp. 2d 964, 974 (E.D. Mich. 2003). SureFire has provided sufficient evidence as to the dates of Exhibits I and J, based on testimony of the letters' recipients. Otherwise, SureFire has not proven the dates, and the hearsay rule applies.

II. Insight's Second Motion to Strike (document no. 114)

Insight moves to strike an affidavit from SureFire's expert witness, John A. Wilson, submitted by SureFire in opposition to Insight's motion for partial summary judgment on infringement. Insight contends that because Wilson failed to disclose his opinions on infringement as required by Rule 26(a)(2), those opinions must be stricken. SureFire objects to the motion, asserting that Wilson was not yet required to

disclose his opinions and that Insight has suffered no prejudice.

In the parties' discovery plan, approved by the court on May 28, 2004, they agreed and the court ordered that initial expert reports on matters that the party bore the burden to prove were due on January 10, 2005. Rebuttal expert reports, limited to the subjects addressed in the initial reports, were due on February 2005. On December 1, 2004, Insight propounded an interrogatory to SureFire asking for identification of every person SureFire intended to have offer expert testimony concerning noninfringement in this case. SureFire responded by saying that Insight was seeking the information prematurely and that SureFire would provide expert information as required by the Federal Rules of Civil Procedure. Insight did not move to compel an answer.

Insight designated its founder and president, Kenneth Solinsky, as an expert witness on infringement, but he did not provide an expert report because Insight asserted he was an employee who did not regularly give expert testimony. See Fed. R. Civ. P. 26(a)(2)(B); see also Order (doc. no. 69), Aug. 2,

2005, at *3. As a result, SureFire did not produce a rebuttal expert report from Wilson on infringement.³

Insight's counsel deposed Wilson on March 14, 2005. As part of the deposition, counsel asked Wilson whether he had compared SureFire's products to claims in the '901 patent for purposes of determining whether they infringed. SureFire's counsel objected, stating: "as you know, we've given notice that Dr. Wilson may be offered as a rebuttal witness on issues of infringement. At this point, absent a report from Insight setting forth the opinions of Insight's expert, we're not prepared to offer Dr. Wilson for deposition on issues of infringement today." Insight's counsel persevered. He then asked Wilson a series of questions about comparing the SureFire device and the Insight device, and Wilson answered those questions. Although SureFire's counsel continued to object to questions that asked for opinions on infringement, Wilson testified about how the SureFire and Insight devices worked.

The confused situation here highlights the pitfalls of the litigation tactics employed in this case. Because the rules did not require it, Insight did not provide an expert report on

³There appears to be no dispute that Wilson was identified as a rebuttal expert on infringement. See Fed. R. Civ. P. 26(a)(2)(a).

infringement, despite planning to offer expert testimony on that topic at trial. See Fed. R. Civ. P. 26(a)(2)(B). Because Insight did not submit an expert report on infringement, the deadline in the discovery plan for submitting rebuttal expert opinion was never triggered. The default schedule provided by Federal Rule of Civil Procedure 26(a)(2)(C), states that an expert opinion "intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), [must be disclosed] within 30 days after the disclosure made by the other party." That schedule also does not appear to apply here, because Insight's expert opinion was not provided under Rule 26(a)(2)(B). Therefore, SureFire apparently was not obligated to disclose Wilson's opinion on infringement.

Even if the Rule 26(a)(2) disclosure requirement applied to Wilson's infringement opinion, SureFire has shown that the unusual procedure with respect to the infringement opinions substantially justified its failure to provide a report from Wilson on infringement. Wilson's deposition covered at least some of the infringement issues, including the function of the Insight device and the SureFire device and whether there were any significant differences between them. SureFire's counsel,

however, would not allow Wilson to give his opinion as to whether SureFire's device infringed the '901 patent.⁴

In his affidavit, Wilson compares SureFire's devices to claim one in the '901 patent, as described in the embodiment section of the patent, and finds differences between them. Wilson does not give an opinion that SureFire's devices do not infringe the '901 patent. It appears, therefore, that Wilson's deposition covered the same ground as his affidavit, preventing prejudice to Insight. Because Wilson was not required to provide an expert report on his rebuttal opinion and alternatively because the lack of a report was substantially justified and Insight suffered no prejudice, Wilson's opinions on infringement are not stricken.

III. SureFire's Motion to Strike (document no. 118)

SureFire moves to strike certain paragraphs in the declaration submitted by Kenneth Solinsky in support of Insight's objection to SureFire's motion for summary judgment. SureFire contends that the challenged paragraphs provide opinions that were not disclosed and that parts of the

⁴Although Wilson might have been obligated to answer questions about his infringement opinion during the deposition, Insight did not move to compel that testimony. Therefore, that issue is not before the court at this time.

declaration are improper opinion. SureFire also challenges three paragraphs in the declaration of Alan T. Howe submitted by Insight in opposition to SureFire's motion for summary judgment.

A. Solinsky Declaration

1. Failure to disclose

SureFire asserts that portions of Solinsky's declaration must be stricken because "[n]one of these opinions has previously been disclosed in this case." Mot. to Strike at 3. As is discussed above and in the court's order issued on August 2, 2005, because Solinsky is an Insight employee whose job does not regularly involve providing expert testimony, Insight was not required to produce an expert report from him. Fed. R. Civ. P. 12(a)(2)(B). Therefore, Federal Rule of Civil Procedure 37(c) does not apply to the circumstances presented here.

SureFire also asserts that three devices discussed in Solinsky's opinion "were never produced or even disclosed in this action" and moves to strike the opinions because Solinsky was not deposed on those subjects. Mot. to Strike at 6. The only support SureFire offers is that use of his opinion "concerning these devices at this time is simply unfair." Id.

at 7. Arguments that something is "simply unfair," without supporting legal authority, are not persuasive. See, e.g., Mitchell v. City of Moore, Okla., 218 F.3d 1190, 1204 (10th Cir. 2000); Bowman v. Morgan, 2006 WL 2348630 at *3 (S.D. Ala. Aug. 11, 2006).

2. Inconsistent with prior testimony.

SureFire contends that because no expert report was provided, it had to rely on Solinsky's deposition to elicit his opinions and faults Solinsky for failing to offer the opinions that now appear in his affidavit. SureFire asserts that Solinsky's failure to discuss certain opinions at his deposition is inconsistent with his affidavit. SureFire, however, has failed to show that the affidavit conflicts with prior "clear answers to unambiguous questions" at his deposition. Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994). Therefore, no basis exists to strike the challenged opinions because of a conflict with prior testimony.

3. Improper opinion

Parts of Solinsky's declaration, SureFire contends, merely adopt the opinions in the rebuttal expert report provided by

Insight's retained expert witness, J. B. Wood, in the Glock case. SureFire asserts that Wood's report was written by counsel, and that based on the similarities, counsel also prepared Solinsky's declaration. Insight responds that Solinsky is not barred from agreeing with Wood and counsel may properly assist an expert in preparing an expert report and a declaration.

Counsel may assist or participate in the preparation of an expert report as long as the report meets the requirements of Rule 26(a)(2) and is signed by the expert. See Lehman Bros. Holdings, Inc. v. Laureate Realty Servs., Inc., 2007 WL 2265199, at *2 (S.D. Ind. Aug. 6, 2007). Counsel's participation in the preparation of a report is not grounds to bar the expert's testimony but may undermine the weight that should be afforded the opinion. Elm Grove Coal Co. v. Director, O.W.C.P., 480 F.3d 278, 301 n. 23 (4th Cir. 2007). On the other hand, an expert is generally expected to provide substantial input to his affidavit or report so that an affidavit or report prepared entirely by counsel may be excluded. See, e.g., Loeffel Steel Prods., Inc. v. Delta Brands, Inc., 387 F. Supp. 794, 808 (N.D. Ill. 2005). Similarly, a disclosed expert cannot provide the opinions of another non-disclosed expert. Dura Auto. Sys. of Ind., Inc. v.

CTS Corp., 285 F.3d 609, 614 (7th Cir. 2002) (holding that expert cannot give opinion that is "just parroting the opinion of [another] expert"); Bouygues Telecom, S.A. v. Tekelec, 472 F. Supp. 2d 722, 728 (E.D.N.C. 2007).

The testimony from Wood's deposition that SureFire cites to show that counsel, not Wood, prepared his report describes a process in which Wood discussed his opinions with counsel and counsel recorded the opinions, sometimes rephrasing Wood's statements in "patent language." The collaborative process described does not establish that counsel, not Wood, was the source of the opinions in the report.

SureFire contends that the opinions Solinsky provides in paragraphs 16, 17, 19-24, and 27 of his declaration are Wood's opinions, not his own, based on the similarity of paragraphs 19-24 to Wood's rebuttal report. Insight first defends the similarity by explaining that Solinsky agrees with Wood's opinions and is expressing consistent opinions. Insight then asserts that the similar paragraphs do not present opinion testimony but instead "are merely factual descriptions of devices found in the prior art" and acknowledges that Solinsky's declaration "include[s] a few factual paragraphs from Mr. Wood's report." Surreply at 3.

Paragraphs 19 through 23 of Solinsky's declaration are identical to paragraphs on pages 3 through 6 of Wood's rebuttal report. Like the "factual descriptions" provided by SureFire's expert, John Wilson, for the animations of certain devices, which Insight moved to have stricken as undisclosed expert opinion testimony, Solinsky's statements in paragraphs 19 through 23 also provide expert testimony, based on his specialized knowledge and experience, about the devices in question. That testimony, however, is from Wood, not from Solinsky, and those statements cannot be parroted in Solinsky's declaration.

Therefore, paragraphs 19 through 23 of Solinsky's declaration are stricken. The opinions stated in the other challenged paragraphs are not taken from Wood's report and are not stricken.

B. Alan Howe Declaration

Alan Howe has been the director of business development at Insight since 1999 and provided a declaration in support of Insight's objection to SureFire's motion for summary judgment. SureFire moves to strike paragraphs 6, 7, and 9 of Howe's declaration on the grounds that those statements are not based on Howe's personal knowledge but instead are merely opinions

provided by Insight's counsel. Insight objects to the motion, arguing that Howe is well qualified to give opinions on the challenged matters.

In paragraph 3, Howe explains that he has "responsibility for marketing Insight's commercial product line." He follows the market for similar devices, monitors Insight's competitors' products, and needs to understand the marketing and distribution channels for Insight's commercial products. He states that because of his work he has personal knowledge about the introduction and marketing of Insight's Slide-Lock tactical illumination products, including the market response to the products and the product features that have been successful.

In paragraph 6, Howe explains that in 1998 when Insight's M3, with Slide-Lock technology, was introduced, few gun owners and law enforcement agencies had weapons that were compatible with the Slide-Lock technology. After 1998, gun purchasers were aware of the Slide-Lock and most gun manufacturers developed compatible systems. Par. 7. In paragraph 9, Howe states that the Slide-Lock technology allowed Insight to break into the market. He further states: "In my opinion, the Slide-Lock mounting system has been, and continues to be, a primary driver of the commercial success of Insight's products featuring that system." Par. 9.

Based on Howe's position at Insight and his awareness of marketing and distribution of Insight's products and those of its competitors, his opinions in the challenged paragraphs are not necessarily outside of his personal knowledge. Because Howe is an Insight employee, his laudatory view of Insight and its products is not surprising nor particularly persuasive. No basis, however, exists to strike the statements.

Conclusion

For the foregoing reasons, the plaintiff's motion to strike (document no. 101) is granted as to the affidavit of John Wilson and the attached animations (exhibit 2 and 3 to document no. 97); Exhibits I, J, K, L, M, N, O, EE, and MM; Exhibit KK; Exhibit F; and all dates on documents submitted by SureFire in support of summary judgment except dates on Exhibits I and J. The plaintiff's motion to strike (document no. 114) is denied. The plaintiff's motion to file a surreply (document no. 133) is granted. The defendant's motion to

strike (document no. 118) is granted as to paragraphs 19 through 23 of Solinsky's declaration and is otherwise denied.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

November 1, 2007

cc: Thomas A. Brown, Esquire
Laura L. Carroll, Esquire
Gary A. Clark, Esquire
Jonathan Hangartner, Esquire
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